BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
07-11-06
04:59 PM

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	Rulemaking 06-04-009 (Filed April 13, 2006)

REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES ON JURISDICTIONAL ISSUES

I. INTRODUCTION

Eight parties, including the Division of Ratepayer Advocates (DRA) filed opening legal briefs on jurisdictional issues pertinent to the Commission's potential adoption of a Greenhouse Gas (GHG) emissions performance standard. DRA's reply brief responds to some of the comments made in opening briefs[1] and assumes that any EPS would follow the broad outlines of a straw proposal that the Division of Strategic Planning (DSP) distributed June 30, 2006. The DSP straw proposal would apply new and renewal contracts and investments of five years or longer.

DRA's reply brief concludes that it is within the Commission's authority to adopt an emissions performance standard (EPS) and that a carefully designed EPS can be harmonized with federal laws governing interstate commerce and Qualifying Facilities (QFs).

[1] The June 1, 2006 Assigned Commissioner's Ruling: Phase 1 Scoping Memo and Notice of Workshop on a Greenhouse Gas Performance Standard set July 10 as the date for reply briefs, but the deadline was extended by one day by a July 6 email ruling.

II. DISCUSSION

A. The Commission's authority includes the power to establish an Emissions Performance Standard for Load Serving Entity (LSE) procurement.

1. An EPS is "cognate and germane" to the CPUC's duty to regulate procurement.

The Center for Energy and Economic Development (CEED),[2] the Cogeneration Association of California (CAC) and the Energy Producers and Users Coalition (EPUC) argue that the Commission's broad authority to regulate public utilities does not include the power to regulate GHG emissions:[3]

> "Not one reference to procurement planning, air quality standards of greenhouse gases in the Public Utilities Code suggests that the Commission has the authority to implement GHG standards in the context of procurement."[4]

This narrow view overlooks the close relation between the proposed EPS and the Commission's duties to promote the safety and reliability of utility service, to provide a financially stable environment for utility operation and to protect ratepayers from financial risk. An EPS that directs utilities and LSEs to avoid new, long-term financial commitments in carbon intensive generation resources protects ratepayers from the risks of high costs of future compliance,[5] promotes certainty and serves to protect overall safety and reliability by minimizing the chance that there will be supply disruption in the event compliance becomes extremely expensive. Thus, an EPS is "cognate and

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[2] CEED's purpose is to educate the public and decisions makers about the benefits of coal-fueled electricity.

[3] Brief on Jurisdictional Issues of the Cogeneration Association of California and the Energy Producers and Users Coalition, filed June 30, 2006 (CAC/EPUC Opening Brief), pp.8-11; The Center for Energy and Economic Development's Opening Brief on Jurisdictional and Other Legal Issues, filed June 30, 2006 (CEED Opening Brief, p. 4.)

[4] CAC/EPUC Opening Brief, p.9.

[5] The Commission recognized the risk of costs likely from compliance with future carbon regulations in both D.04-12-048 at Findings of Fact 76 and 77 and in D.05-04-024.

germane"[6] to the Commission's power to regulate utilities, including th
e requirement to oversee resource adequacy of Load Serving Entities (LSEs).[7]

2. Section 701.1 of the Public Utilities Code does not prevent the Commission from implementing an EPS.

CAC and EPUC take a myopic view of the Commission's authority under Section 701.1 of the Public Utilities Code, arguing that it prevents the Commission from regulating CO2 since CO2 is not a criteria pollutant for which ambient air quality standards have been set.[8] This perceived limitation mischaracterizes Section 701.1. Although Section 701.1(d) contains a protocol for determining emissions values "associated with the current operating capacity of existing power plants pursuant to subdivision (c) [of Section 701,1], that protocol by its own terms would not apply to an EPS for new long term procurement.

In fact, Section 701.1(a) of the Public Utilities Code finds and declares that "a principal goal of electric and natural gas utilities' resource planning and investment shall be to minimize the cost to society of the reliable energy services that are provided by natural gas and electricity and to improve the environment…."[9] Section 701.1 therefore supports the enactment of an EPS as consistent with the Commission's obligation to consider the environmental as well as ratemaking consequences of energy procurement.

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[6] *Southern California Gas Co. v. Public Utilities Commission,* 24 Cal. 3d 653, 656 (1979).

[7] Public Utilities Code Section 380(e); *see also* D.06-06-071, p. 20, in which the Commission concluded that its legitimate interest in reducing GHG emissions in connection with both Resource Adequacy and the Renewable Portfolio standard supported imposition of the load based cap in electric service providers within the utilities service territory.

[8] CAC/EPUC Opening Brief, p. 10.

[9] Section 399(e)(1) of the Public Utilities Code echoes the that investments that "mitigate[e] environmental costs of California energy users' electricity consumption" are properly included in regulated electricity prices.

3. The rationale of *Massachusetts Electric Company v. Department of Public Utilities* does not prevent the Commission from establishing an EPS.

The CPUC operates in a different statutory framework than the one that existed in *Massachusetts Electric Company v. Department of Public Utilities*,[10] cited by CEED in support of its argument that the CPUC cannot enact an EPS. The Massachusetts Supreme Court concluded in *Massachusetts Electric Company* that the Department of Public Utilities could not consider the cost of pollution on society at large in evaluating utility procurement bids. The court reasoned that because the Massachusetts legislature had not included the environmental costs of energy to society as within the scope of jurisdiction of that Department of Public Utilities, the Department's consideration of such costs were not proper. In contrast, the California legislature has included environmental costs associated with energy as an appropriate subject of review in procurement planning.[11]

In any case, as the Natural Resources Defense Council (NRDC) pointed out, the Massachusetts Supreme Court acknowledged that even in the absence of legislation enabling the Department of Public Utilities to consider the cost of pollution to society, the Department could require utilities to "pursue a course likely to be less costly to ratepayers in the long term."[12] Minimizing costs and risks to ratepayers is one of the primary goals in implementing an EPS.[13]

B. Application of an EPS need not conflict with the Public Utilities Regulatory Power Act (PURPA)

PURPA, as amended by the Energy Policy Act of 2005 (EPAct 2005), currently requires utilities to purchase power from QFs at their avoided cost. While EPAct 2005 provides that FERC may relieve utilities of their mandatory purchase obligation once it

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[10] 419 Mass. 239, 245-246 (1994).

[11] Public Utilities Code Sections 399(e)(1); 701.1(a).

[12] Opening Brief on Phase 1 Legal Issues Associated with the Greenhouse Gas Emissions Performance Standard of the Natural Resources Defense Counsel, p. 13, quoting *Mass. Electric Co,* 419 Mass. at 246.

[13] The June 30, 2006 DSP straw proposal lists four design goals for the EPS, including "[m]inimize costs to ratepayers and minimize the risk of long-term commitments that will raise the cost of future

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makes a determination that a functioning competitive market exists,[14] FERC has not yet made this determination for California markets. Utilities are therefore still obligated to purchase energy from QFs.

The Independent Energy Producers Association (IEP) observes that the output of most Qualifying Facilities (QFs) would likely comply with any EPS because of their inherently favorable GHG profiles.[15] The current straw proposal envisions an allowance for the thermal load of cogeneration facilities in calculating the GHG profiles for cogeneration facilities. As a practical matter, application of an EPS may rarely pose a problem for QFs.

If however, the emissions profile of a QF did not meet the EPS, application of the EPS to QFs need not conflict with the utilities' existing mandatory purchase obligation. San Diego Gas & Electric correctly points out that utilities can meet their PURPA requirements through short term contracts.[16] The EPS as currently proposed would apply to contracts of five years or longer and would therefore not prevent the QF from selling energy to a utility under a shorter term contract. Thus, applying to the EPS to QFs would not "place utilities between the Scylla of PURPA and the Charybdis of the EPS,"[17] but would instead be a logical application of the standard.

C. An Emissions Performance Standard that applies regardless of whether a generator is in state or out of state would not violate the Interstate Commerce Clause.

CEED argues that the Commission's adoption of an EPS would violate the Interstate Commerce Clause Article I, Section 8, Clause 3 of the United States

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compliance costs."

[14] PURPA Section 210(m).

[15] Opening Brief of the Independent Energy Producers Association, filed June 30, 2006 (IEP Opening Brief.), pp. 1-2.

[16] Opening Brief of San Diego Gas and Electric Company and Southern California Gas Company, filed June 30, 2006, p. 7.

[17] IEP Opening Brief, p.5.

Constitution. CEED's contention misconstrues the likely parameters of any EPS. Under the current straw proposal the EPS would apply equally to instate and out of state generation, and would operate to further California's interests in protecting ratepayers from increased cost of future compliance and enhancing the reliability and safety of utility service, among others. It is not protectionist in its intent or implementation, and any burden on interstate commerce is only incidental. An EPS would therefore meet the standard articulated in *Pike v. Bruce Church,* [18] which allows states to enact regulations related to matters within their jurisdiction, as long as the regulation is evenhanded, the burden on interstate commerce is incidental and the benefits outweigh the burden on interstate commerce. The state's strong interest in protecting the interests of ratepayers and mitigating the negative impacts of energy consumed within the state outweigh any burden on generators who sell carbon intensive energy.

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[18] 397 U.S. 137, 142 (1970).

III. CONCLUSION

For the foregoing reasons, DRA respectfully requests that the Commission adopt its recommendations.

Respectfully submitted,

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July 11, 2006

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Executed on **July 11, 2006** at San Francisco, California.

/s/ HALINA MARCINKOWSKI
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